APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v. NO. 71-1124
MORTON MAYER SOBEL,
Appellant.

On Appeal from the United States
District Court for the
Central District of California

Before: CHAMBERS, HAMLEY and CHOY, Circuit Judges.

PER CURIAM:

The judgment of conviction is reversed.

We find the government, once sanity was an issue, did not sustain its burden of proof.

No. 71-1124

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

MORTON MAYER SOBEL,

Appellant.

Petition for Rehearing and Suggestion for Appropriateness of Hearing En Banc.

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No. 71-1124

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellee,*

vs.

MORTON MAYER SOBEL, *Appellant.*

Petition for Rehearing and Suggestion for Appropriateness of Hearing En Banc.

To the Honorable Judges: Chambers, Hamley and Choy of the United States Court of Appeals for the Ninth Circuit:

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the appellant herein respectfully petitions this court for rehearing in the above captioned case. The judgment of the court was entered on July 15, 1971 and by order of Judge Chambers, dated July 30, 1971 and filed July 30, 1971, the appellant has to and including August 10, 1971 in which to file this petition.

PRELIMINARY STATEMENT.

Oral argument in the instant case was held on July 13, 1971 at 2:00 P.M. On July 15, 1971 the following *per curiam* opinion was filed:

> "The judgment of conviction is reversed. We find the government, once sanity was an issue, did not sustain its burden of proof."

The Court, by this brief *per curiam* opinion, clearly found that the government, once sanity was put in issue by the defendant, failed *as a matter of law* to prove the defendant's sanity beyond a reasonable doubt and that the defendant should have been entitled to an acquittal in the court below.

Now the question arises as to whether or not the defendant-appellant can be retried on the same offenses because this court did not direct either a retrial, a dismissal of the indictment or a direction to grant the defendant-appellant's motion for judgment of acquittal upon remand pursuant to 28 U.S.C. Section 2106.

It is respectfully submitted that the appellant herein cannot and should not be subjected to a retrial in this case for each of the following reasons which will be set forth more fully below:

1. To subject the appellant to a retrial would violate the command of the Fifth Amendment relating to double jeopardy.

2. To subject the appellant to a retrial would be unfair in view of the fact that the government *deliberately bypassed* the opportunity to meet its burden of proof in the court below through the introduction of expert and lay testimony on the issue of sanity.

There is also a suggestion for rehearing *en banc* because this issue has never been precisely resolved in this or any other Circuit, or for that matter by the United States Supreme Court and is an issue of substantial Constitutional dimension.

I.

Where the Issue of Sanity Is Raised by the Defendant and the Government Deliberately Foregoes Its Opportunity to Contest the Issue Which Results in the Judgment of Conviction Being Reversed by the Court of Appeals Because the Government Failed to Sustain Its Burden of Proof a Retrial Would Violate the Command of the Fifth Amendment Relating to Double Jeopardy.

This very question was raised by and considered by the Ninth Circuit Court of Appeals on the government's petition for rehearing in *Buatte v. United States*, 331 F. 2d 848 (9th Cir. 1964). The Court in that case denied the appellee's petition for rehearing on the ground that the items cited in said petition would not suffice to meet the requirements of *Davis v. United States*, 165 U.S. 332 (1897) and then went on to make the following observation:

> "Since we take this view of the petition and deny it upon that ground, it is unnecessary for us to consider the further question whether in the circumstances of this case, since this court has held that judgment of acquittal for lack of evidence should have been entered and has reversed the judgment on that ground, the granting of a new trial would violate the command of the Fifth Amendment relating to double jeopardy. See the concurring opinion in Sapir v. United States, 348 U.S. 373, 75 S. Ct. 422, 99 L. Ed. 426, as commented upon in Forman v. United States, 361 U.S. 416, at page 426, 80 S. Ct. 481, 4 L.

Ed. 2d 412, and see 'Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence' 31 University of Chicago Law Review 365."

All of the above authorities stand clearly for the proposition that where a reversal is based upon insufficiency of the evidence and can only be cured by introduction of new evidence and where no motion for new trial was made (all as in the case at bar) the command of the Fifth Amendment relating to double jeopardy must be obeyed and the successful appellant cannot be subjected to a retrial.

This should be especially true where as here, the government deliberately bypassed its opportunity to obtain pretrial production of the defendant's medical tests and reports or present expert and/or lay testimony in the trial of this case as is more fully set forth *infra* in Number II below.

II.

Even if This Honorable Court Does Not Agree That the Appellant's Retrial Would Violate the Command of the Fifth Amendment Relating to Double Jeopardy, a Retrial Should Nonetheless Be Barred Because the Prosecution Deliberately Bypassed Its Opportunity to Obtain Pretrial Production of the Defendant's Medical Tests and Reports or Present Evidence (Both Expert and/or Lay) in the Trial of This Case.

The instant prosecution is unique in that the government although afforded the opportunity to do so,

The Ninth Circuit Court of Appeals also appeared to quote the concurring opinion in *Sapir v. United States*, *supra*, with approval in *Bowser v. United States*, 264 F. 2d 955, 956 (9th Cir. 1959).

deliberately bypassed its opportunity to obtain medical reports in advance of trial or to present evidence (expert or lay) on the issue of sanity. This is demonstrated by the following:

1. When the defendant in the court below filed a motion for pretrial discovery pursuant to Federal Rules of Criminal Procedure (16)(a)(2) requesting "results or reports of physical or mental examinations" [Clk. Tr. p. 2, No. 2], the government was entitled to reciprocal discovery pursuant to Federal Rules of Criminal Procedure No. 16(c). The government, in responding to the defendant's motions, deliberately bypassed its opportunity to obtain, in advance of trial, the medical reports and tests testified to by Dr. Weaver [Clk. Tr. pp. 33-36].

It must be recalled that Dr. Weaver described certain psychological tests which had been administered to Mr. Sobel on September 17, 1969 by Dr. McBroom [Rep. Tr. pp. 298, 299-303] approximately one year prior to trial.

2. One day prior to the testimony of Dr. Weaver government counsel presented a Motion to Compel Defendant to Submit to Psychiatric Examination and Order [Clk. Tr. pp. 76-81] to the court. Government counsel informed the court that should its motion be granted he had already made an appointment with one of the psychiatrists on the panel who could examine the defendant at 8:00 A.M. the following morning and have a report ready by 1:00 P.M. that afternoon so that proceedings would not be delayed [Rep. Tr. p. 273].

After hearing argument, the court ruled that it would grant the government's motion [Rep. Tr. p. 280] and appointed Dr. Marcus Crahan, the government's choice

of an examining psychiatrist [Rep. Tr. p. 282] even though defense counsel objected to Dr. Crahan on the grounds that he was a hand-picked pro-government psychiatrist [Rep. Tr. p. 280].

After Dr. Weaver's testimony had been concluded, it was agreed that the government's expert witness, Dr. Crahan, would be furnished with all of the materials that had been furnished to Dr. Weaver as a basis for his conclusion. The Court then inquired of government counsel if it was his intention to call Dr. Crahan the next morning and government counsel asked for a 10 minute recess to make a decision on that matter because, "I may have reconsidered calling Dr. Crahan." [Rep. Tr. p. 359]. When the recess had been concluded and several other matters, including a denial of the defendant's motion for judgment of acquittal, had been determined between the court and counsel, government counsel moved to withdraw his motion for the appointment of a psychiatrist, which motion was granted by the court [Rep. Tr. p. 347].

The government, in withdrawing said motion after having it granted by the court with all arrangements made therefor, deliberately bypassed its opportunity to present expert testimony on the issue of sanity.

3. The government presented no lay testimony on the issue of sanity although such testimony was available through Agent Tarallo and Deputy Collier. It should also be of considerable interest to note that the government had available as a witness Myrna Courtney [Rep. Tr. p. 180] through whom both Agent Tarallo and Deputy Collier were introduced to the defendant-appellant. Surely Myrna Courtney, because of her long association with the defendant-appellant, could have been in a position to testify as to his sanity or lucidity.

The government in not calling lay witnesses to testify as to Sobel's sanity, although such witnesses were available, deliberately bypassed its opportunity to present relevant lay testimony on the issue of sanity.

This Honorable Court has held that under such circumstances a retrial would be unfair to a successful appellant. In *United States v. Howard*, 432 F. 2d 1188, 1190 (9th Cir. 1970), a concurring opinion by two members of the panel made the following observation which would be directly in point in this case:

> "When a judgment of conviction is reversed for insufficiency of the evidence, the determination of whether the indictment should be dismissed or there should be a retrial rests within the sound discretion of the court. See, e.g., Bryan v. United States, 338 U.S. 552, 70 S. Ct. 317, 94 L. Ed. 335 (1950); C. Wright, Federal Practice & Procedure, Criminal (Section 470). When an appellate court exercises this discretion, it must look to the record, undertaking to ascertain *if the prosecution had the opportunity fully to develop its case, or in fact did so. If it did; or if it appears that it was responsible for its failure adequately so to do, then it is not ordinarily fair that the successful appellant should be required to undergo another trial.*" (Emphasis supplied).

In relying on *Bryan v. United States, supra*, the court above quoted did not consider the later concurring opinion in *Sapir v. United States, supra*, which was approved by this Circuit in *Forman v. United States, supra*, and by the United States Supreme Court in the same case after certiorari had been granted, *Forman v. United States, supra*.

Even if this court should conclude that the retrial of the defendant-appellant herein would not violate the command of the Fifth Amendment relating to double jeopardy, it would, under the criteria set forth in *United States v. Howard, supra,* and the facts in this case, be impermissibly unfair.

It should further be noted that in *Buatte v. United States,* 330 F. 2d 342 (9th Cir. 1964) and the cases primarily relied upon in that decision as well as the only decision following *Buatte v. United States, supra,* where the Ninth Circuit reversed a conviction because the prosecution failed to sustain its burden of proof,[2] the convictions were in each case reversed with directions to grant the defendant's motion for judgment of acquittal.

This case was at least as strong as any of those above cited, and is the only case where the government deliberately bypassed the opportunity to prepare for and present expert and lay testimony at the trial in the court below.

III.

Suggestion for Rehearing En Banc.

It is respectfully submitted that the issues posed in this instant petition for rehearing raise Constitutional questions of substantial dimension and are worthy of consideration by this Honorable Court En Banc.

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[2] *McKenzie v. United States,* 266 F.2d 524 (10th Cir. 1959); *United States v. Westerhausen,* 283 F. 2d 844 (7th Cir. 1960); *Argent v. United States,* 325 F. 2d 162 (5th Cir. 1963); *Isaac v. United States,* 284 F. 2d 168, (D.C. Cir. 1960).

[3] *Hartford v. United States,* 362 F. 2d 63 (9th Cir. 1966).

Conclusion.

The opinion of this Honorable Court dated July 15, 1971 should be clarified to provide for a granting of the appellant's motion for judgment of acquittal upon remand and to clear up any possible misunderstanding by the court below of the import and meaning of said opinion.

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Attorney for Morton Mayer Sobel, Appellant.

N O. 71-1124

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

MORTON MOYER SOBEL,

Defendant-Appellant.

GOVERNMENT'S RESPONSE
TO APPELLANT'S PETITION FOR REHEARING
AND APPROPRIATENESS OF HEARING EN BANC

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AND APPROPRIATENESS OF HEARING EN BANC

PRELIMINARY STATEMENT

On July 15, 1971 the following per curiam opinion was filed in the instant case by the United States Court of Appeals for the Ninth Circuit.

"The judgment of conviction is reversed.

We find the government, once sanity was on issue, did not sustain its burden of proof."

The defendant should be subjected to a retrial in this case. A retrial would allow the government the opportunity to have the defendant examined by a court-appointed psychiatrist to determine the defendant's sanity or insanity, which evidence would suffice to

deemed to have waived the constitutional protection against double jeopardy.

II

A MISTRIAL SHOULD BE ORDERED IN THIS CASE

The government did bypass the opportunity to have the defendant examined by a court-appointed psychiatrist who could in turn testify concerning his findings in court. This decision was based on the government's contention that the proper opinion of the defense psychiatrist, Dr. Weaver, was going to be based on an incorrect view of the facts and therefore his testimony would be rejected by the trier of facts. (Reporter's transcript pp. 140-142, 147-149, also see Appellee's Brief in the instant case pp. 17-18).

The testimony of Bureau of Narcotics and Dangerous Drugs Agent Tarallo and Deputy Sheriff Collins showed that the defendant was actively engaged in the sale of narcotics. It is submitted by the government that no evidence presented by the defense would provide sufficient evidence to cause the trier of fact to believe the defendant to be insane.

The medical reports of the appellant were sought by the government in advance of the trial as there was no indication from any information in the hands of the

government at that time that the issue of insanity was to be raised by the defense.

The burden on the defendant to defend himself in a subsequent trial is far outweighed by the interest of society in [illegible] preventing the guilty from escaping just punishment." Howard v. United States, supra at 299.

CONCLUSION

No Rehearing En Banc is sought by the government. The government requests a modification of the opinion of this Honorable Court dated July 15, 1971 to provide for a retrial in the instant case.

Respectfully submitted,

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